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In the Supreme Court of the United States

OCTOBER TERM, 1957

DOMINIC SCIRIA, PETITIONER

v.

JOHN M. LEHMANN, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulation involved	2
Statement	4
Argument	9
Conclusion	13

Citations

Cases:

Hintopoulos v. *Chaughnessy*, 353 U.S. 72	10
Jay v. *Boyd*, 351 U.S. 345	11
Lehman v. *Carson*, 353 U.S. 685	2, 8, 9, 11, 12
Mulcahey v. *Catalanotte*, 353 U.S. 692	11

Statutes and Regulation:

Immigration and Nationality Act of 1952	
Section 241 (66 Stat. 204; 8 U.S.C. 1251)	2, 4, 8, 13
Section 405(a) (66 Stat. 280; 8 U.S.C. 1101, Note)	3, 8, 11
8 C.F.R., 1952 rev., 244.3	2, 4, 7, 11

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OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (Pet. 18-19) is reported at 248 F. 2d 519. The memorandum opinion of the District Court (Appellant's App. 5a-14a) [1] is reported at 136 F. Supp. 458.

JURISDICTION

The judgment of the Court of Appeals was entered on October 14, 1957 (Pet. 19) and an order denying

[1] References to the appendices to the appellant's (the present respondent's) main brief and reply brief in the Court of Appeals are designated as "Appellant's App." and "Appellant's Reply App.", respectively.

a petition for rehearing on February 21, 1958 (Pet. 19). The petition for a writ of certiorari was filed on May 15, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals, which denied petitioner the discretionary relief of suspension of deportation on the basis of a lack of showing that his deportation would result in exceptional and extremely unusual hardship, erred in making an alternative finding, on the basis of confidential information which it was empowered to consider under a service regulation, 8 C.F.R., 1952 rev., 244.3, that his case was not a proper one to be sent to Congress.

2. Whether this Court's recent opinion in *Lehmann* v. *Carson*, 353 U.S. 685, that an illegal entrant who could not be deported under prior laws is deportable under the 1952 Act, should be reexamined.

STATUTES AND REGULATION INVOLVED

The Immigration and Nationality Act of 1952 provides:

> Section 241 [66 Stat. 204; 8 U.S.C. 1251].
>
> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;
>
> (2) entered the United States without inspection or at any time or place other

than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

* * * *

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a) notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act [June 27, 1952], or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

* * * *

Section 405(a) [66 Stat. 280; 8 U.S.C. 1101, Note].

(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the

> statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *

A regulation of the Immigration and Naturalization Service (8 C.F.R., 1952 rev., 244.3) provided:

> *Use of confidential information.* In the case of an alien qualified for voluntary departure or suspension of deportation under section 242 or 244 of the Immigration and Nationality Act the determination as to whether the application for voluntary departure or suspension of deportation shall be granted or denied (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security.

STATEMENT

The petition for a writ of certiorari seeks review of a judgment of the Court of Appeals for the Sixth Circuit (Pet. 19) reversing an order of the District Court for the Northern District of Ohio granting a writ of habeas corpus on the basis that petitioner, who entered this country illegally as a stowaway on or about July 28, 1922, had acquired a status of nondeportability and was consequently not subject to deportation under Section 241(a)(1) of the Immigration and Nationality Act of 1952 (66 Stat. 204, 8 U.S.C. 1251(a)(1)).

The relevant facts may be summarized as follows:

Petitioner, a citizen of Italy, entered the United States on July 28, 1922 at New York City as a stowaway without passport or other travel documents, and there evaded inspection by United States immigration officers, intending to remain permanently in the United States (Appellant's Reply App. 17a-22a; Appellant's App. 2a-3a). A warrant of arrest was issued on December 16, 1953, charging that petitioner was subject to deportation, having entered the country illegally as a stowaway and without travel documents (Appellant's App. 3a). On January 28, 1954, after a hearing under the warrant, the special inquiry officer found on the facts that petitioner was deportable as charged.[2] The special inquiry officer also denied petitioner's application for suspension of deportation, finding that, although he was statutorily eligible for consideration for such relief (Appellant's Reply App. 20a), "careful consideration of the evidence leads to the conclusion that the degree of hardship which would result is not sufficient to justify a finding that it would be 'exceptional and extremely unusual hardship' so as to satisfy the requirements of the Act of 1952."

On appeal to the Board of Immigration Appeals, petitioner excepted only to that part of the Special Inquiry Officer's report finding him ineligible for suspension of deportation. On June 11, 1954, the Board

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[2] Petitioner testified on the hearing that he had been convicted of two crimes. In 1928, he was convicted in West Virginia of the crime of transporting liquor, and in 1942 in Ohio was convicted of the crime of extortion (Appellant's Reply App. 18a-19a). The finding of deportability, however, was not based on this evidence.

of Immigration Appeals, noting that the record did not contain a current neighborhood investigation of petitioner, returned the case to the special inquiry officer for such investigation without passing on the merits of the application for suspension (Appellant's Reply App. 22a-23a). Such investigation was made, and a new order was rendered by the special inquiry officer on November 9, 1954, denying petitioner's application for suspension (*Ibid.*, pp. 23a-25a). This order states in pertinent part (*Ibid.*, p. 24a):

> A report of a neighborhood character investigation conducted by this Service was entered into evidence as Exhibit No. 11 over objection of counsel in connection with the last sentence shown in the report with respect to statements relative to the respondent's previous employment made by the three witnesses interviewed. This statement is as follows: "All stated that to their knowledge the subject had never had a legitimate occupation until approximately two or three years ago."
>
> Report shows that these witnesses are unwilling to appear to testify against the respondent for which reason counsel concluded that it would vain to ask that they be called for examination, and no specific request that they be called was entered. As the period of employment in question was approximately two or three years ago and respondent, himself, has previously testified that he was unemployed from about 1946 to about 1951 due to an eye ailment, the report was properly entered into evidence.
>
> * * * *
>
> Report of the investigation conducted does not establish that the respondent has conducted him-

> self as other than a person of good moral character since 1946. However, upon full and careful consideration of all the evidence and attending facts and circumstances in this case, no further evidence has been submitted which we feel would justify reconsideration or change in our previous decision and order in this case.

On petitioner's further appeal, the Board of Immigration Appeals, under an order dated December 30, 1954, dismissed the appeal (Pet. 15-17), stating that (Pet. 17), "On this record, we are unable to make the required finding that the [petitioner's] deportation would result in exceptional and extremely unusual hardship to himself or to his family." The order also stated (Pet. 17) "Furthermore, we do not believe that this is a case that should be sent to Congress with the request for suspension of deportation," and observes that this latter conclusion is supported by confidential information in the file, which though not competent on the issue of deportability, was proper to use "in considering the issue of discretionary relief", pursuant to a regulation of the Service (8 C.F.R., 1952 rev., 244.3). The order concludes (Pet. 17), "He has been granted permission to depart voluntarily from the United States, in lieu of deportation and on this record, this is the maximum relief warranted as a matter of discretion."[3]

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[3] On his appeal, petitioner attacked only the denial of his application for suspension of deportation and the opinion of the Board of Immigration Appeals is captioned in part "APPLICATION: Suspension of deportation—Exceptional and extremely unusual hardship". In connection with his appeal, petitioner submitted character affidavits executed by

On April 12, 1955, petitioner instituted the instant action for habeas corpus seeking release on the ground that he had a status of non-deportability under the prior immigration laws which was preserved by the savings provision in Section 405(a) of the Immigration and Nationality Act of 1952 (66 Stat. 280, Note following 8 U.S.C. 1101), so as to render him non-deportable under Section 241(a)(1) of that Act (8 U.S.C. 1251 (a)(1), *supra*) as an alien who was at the time of entry excludable by the law existing at the time of such entry (Appellant's App. 2a-4a). Petitioner made no specific objection to the order of the Board of Immigration Appeals holding against his application for suspension of deportation. The District Court, after a hearing addressed solely to the issue of his deportability under the 1952 Act, granted the writ of habeas corpus on the sole basis that his status of non-deportability had been preserved by the savings provision in the 1952 Act. The respondent filed an appeal limited to this single issue.

On October 14, 1957, the Court of Appeals reversed the judgment of the District Court (Pet. 19) on the basis of this Court's decision in *Lehmann* v. *Carson*, 353 U.S. 685, rendered after the judgment of the District Court in the instant case. The Court of Appeals

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three of the witnesses referred to in the investigatory report identified in the immigration record as Exhibit 11, which he contended were favorable to his character, and negated any adverse implication contained in the investigator's report (Pet. 17). The Board of Immigration Appeals stated, however, that (Pet. 16-17), "An independent character investigation conducted by the Service is not entirely favorable to the [petitioner's] application for the discretionary relief of suspension of deportation (Ex. 12)."

noted that the *Carson* case was (Pet. 19) "not distinguishable from the case at bar." On February 21, 1958, the Court of Appeals denied petitioner's motion for rehearing (Pet. 19), based on contentions going to the legality of the denial by the Board of Immigration Appeals of petitioner's application for suspension of deportation—contentions which were neither specifically raised in his application for a writ of habeas corpus, nor on the respondent's appeal, and which were apparently suggested for the first time in the brief of the appellee in the Court of Appeals.

ARGUMENT

1. Petitioner's contention that the Board of Immigration Appeals erroneously relied on confidential information in denying him the discretionary relief of suspension of deportation is not properly at issue for two reasons. First, the point was not specifically raised nor relied on by petitioner in his petition for a writ of habeas corpus in the District Court, it was not dealt with by the District Court in its order granting the writ, and it is outside the issue of the legality of petitioner's deportation, the sole basis of the respondent's appeal to the Court of Appeals from an adverse decision on that issue rendered by the District Court.

Secondly, it is clear from the opinion of the Board of Immigration Appeals (Pet. 15-17) that it did not rely on confidential information to support its primary conclusion that petitioner was not entitled to the discretionary relief of suspension of deportation. The controlling conclusion of the Board is that (Pet. 17),

"On this record, we are unable to make the required finding that the [petitioner's] deportation would result in exceptional and extremely unusual hardship to himself or to his family." Such a conclusion does not depend on evidence which negates petitioner's good character but on the absence of affirmative proof that deportation would produce the kind of hardship which Congress has made a necessary condition to the discretionary relief sought. This was also the basis of the denial of such relief by the Special Inquiry Officer (see *supra*, p. 5). It obviously is, under the statute, a valid basis for the denial of such relief. While the Board also observed that (Pet. 17), "Furthermore, we do not believe that this is a case that should be sent to Congress with the request for suspension of deportation," and noted that there was confidential information in the file in support of this subsidiary conclusion, it did not base its denial of relief on this alternative ground. Regardless of the validity of petitioner's argument in respect to the legality of the use of confidential information as the basis for the denial of discretionary relief, that issue, however resolved, does not affect the controlling fact relied on by the Board—that the record does not support the required finding that deportation would result in exceptionally and extremely unusual hardship to the alien or his family. This is a conclusion which is not based on confidential information, and which certainly is "neither capricious nor arbitrary." *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 77.

Even if the exercise of administrative discretion had been based on the use of confidential information,

it is clear that, in the circumstances of this case, such procedure would not have been improper. The Board made specific reference to its authority under a Service regulation (8 C.F.R., 1952 rev., 244.3, *supra*) to use confidential information (Pet. 17), "in considering the issue of discretionary relief." The validity of this regulation which allows the discretionary denial of suspension to (8 C.F.R., 1952 rev., 244.3) "be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security," was expressly upheld in *Jay* v. *Boyd*, 351 U.S. 345. Specific reference to the regulation should be an adequate indication that the Board in this instance determined that "the public interest" required that the confidential information not be disclosed.

2. Petitioner's further contention that he obtained a status of non-deportability under the immigration laws subsequent to his illegal entry into this country in 1922, which status was preserved by the savings clause contained in Section 405(a) of the Immigration and Nationality Act of 1952 (*supra*), is fully met by this Court's recent opinion in *Lehmann* v. *Carson*, 353 U.S. 685, rehearing denied, 354 U.S. 944. See also *Mulcahey* v. *Catalanotte*, 353 U.S. 692.[4] There is no basis for petitioner's attempt to distinguish his case from *Carson* by virtue of the fact that

[4] This contention was not raised by petitioner before the Immigration Service but was apparently made for the first time in the instant judicial proceedings.

no prior deportation proceedings were instituted against that respondent who entered this country as a stowaway in 1919, whereas in this case deportation proceedings were instituted in 1927 but were dismissed because not commenced within the statutory limitation period of five years which then controlled. The *Carson* case held that, whether or not the savings provision of the 1952 Act preserved a status of nondeportability unless "otherwise specifically provided", Congress did specifically provide for the deportation of persons situated as is petitioner, and that such persons are deportable under the 1952 Act if they fall within the prescribed classes, regardless of their deportability under the prior legislation. The Court was unanimous in its view that the statute so provided. 353 U.S. at 690.

Petitioner also asks this Court to reconsider its ruling in *Carson* (Pet. 10-11) "because the opinion fails to distinguish whether the Court intended that all aliens are deportable who were excludable at the time of entry from those aliens who were excludable at the time of entry and later adjusted their status in the United States to legal residence." This contention was also made in the *Carson* case (see Pet. Reply Br., No. 72, O.T. 1956, pp. 10-12). Here, as there, the proposition is an academic one since neither Carson nor this petitioner adjusted his status to that of legal resident after his illegal entry. As the *Carson* opinion makes clear, the illegal residence of neither ripened into a legal status by the inability of the government to deport them under the then existing five-year time limitation provision.

In any event, as we pointed out in the *Carson* case (see Pet. Reply Br., No. 72, O.T. 1956, pp. 10-12), the treatment of an alien who had his status adjusted to that of legal resident is the same either under the old or new law and has not been affected by the repealer. A person who was given a right of legal residence under the old law was not deportable then, any more than he would be under the new Act. The retrospective nature of Section 241 requires only that prior facts be judged by the new law; it does not wipe out reasons for not being deported which were valid under the old law and which remain valid under the new law. The basis on which petitioner asks this Court to review its recent *Carson* decision therefore has no application to the facts of this case, and petitioner raises no further challenge to its validity nor cites any change or variation of circumstances warranting reconsideration of this recent holding.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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